

*United States Court of Appeals
for the Second Circuit*



**RESPONDENT'S
BRIEF**

76-4243

No. 76-4243

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PROTE CONTRACTING CORPORATION,

Respondent.

B

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

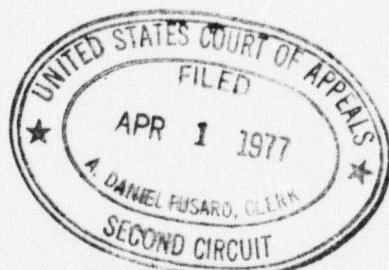
brief for the RESPONDENT

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BRIEF FOR PROTE CONTRACTING CORP,
Respondent.

STATEMENT OF ISSUE PRESENTED

Was the lay-off of RAMON INSUA, ISMAEL RIAL, JOSE PEPE GONZALES, FELIPE BEIRO, JOSE GONZALEZ OTERO, JUAN POMBO, and EURIPIDIS PANTZOS, based upon the virtual completion of the painting work at P.S. 165 and Newtown High School.

STATEMENT OF THE CASE

The National Labor Relations Board has obtained an order against the Respondent, Prote Contracting Co., on October 15, 1974 and compliance therewith is now before this Honorable Court to be enforced.

THE FACTS.

The Respondent Company has had three labor contracts with District Council # 9, the first prior to 1968 (A-46-48) and the second a memorandum agreement dated November 1971 (A-29) and the third attached hereto dated July 9, 1974 and attached hereto. The last contract was consummated during negotiations that caused Respondent to grant in excess of \$2800.00 to Four of the employees, out of the seven laid off. Two of the seven should be deducted from the seven included in the complaint, as FELIPE BEIRO has been deported as an illegal

alien (A-34-footnote) and ISMAEL RIAL has been more or less continuously employed by the Respondent Corporation until mid-March 1977. E. PANTZOS was notified by the Unemployment Board that Mr. Prote wished to recall him but he did not respond (A-139). All the testimony indicates that ALPHONSE CASTRO a supervisor and member of the Union persuaded most of the men to join him in accepting District #9 as Bargaining Agent (A-119, 140, 148, 149, 158, 159, 168 and 183). He was also the employee who gave the orders (A 133, 146, 157) and he and the other Supervisor JAMES SATCHELL notified the laid-off employees that their services were being terminated due to the substantial completion of the painting at P.S. 165 and Newtown High School as the specifications clearly show (A 161) . The Letter of 7/18/73 by Casual Decor, Inc., whom Respondent believes to be a union contractor, clearly shows a signature by A. KEFALOGLIANNIS, President thereof (A-24) and its language indicates that it was in response to a request by Prote Contracting Co.,. The further fact that the letter of 1/21/74 (A 23) shows that the offer is reduced by \$500.00 is material and never considered by the Administrative Law Judge.

At the time of the layoff on January 25, 1974 the Administrative Law Judge found that the work on P.S. 165 was within 1% of being completed (A-30) It should also be noted that of those continued in employment, ALPHONSE CASTRO AND EURIPIDIS PANTZOS, signed authorization cards for the union. According to Pantzos testimony (A-123-124) RIAL(who was employed by Prote up until mid-March 1977), JUAN PEPE GONZALES, RAMON INSUA, DESIDERIO POMBO, LUIS CASTRO and ALPHONSE CASTRO, all signed cards . According to the judgment of the Administrative Law Judge (A-30) Desidero Pombo, Luis Castro continued working at Newtown High School. It was also the judgment of the Administrative Law Judge that the alleged 8(a)(1) allegations were not an interrogation but if they happened were not more than rhetorical abuse. In his judgement it has no tendency to interfere with, restrain or coerce employees A(32).

The Respondent has given the following sums to some of the alleged discrimin-
atees \$978.00 to JOSE GONZALES on October 22, 1974; \$644.25 to EURIPIDIS
PANTZOS on October 29, 1974: \$930.00 to JUAN POMBO and \$289.00 to RAMON
INSUA, on October 22, 1974. These facts were not before the Administrative
Law Judge at the time he rendered his decision, but as all of the facts are
before this Court, it is timely that it be noticed.

The Respondent avers upon information and belief that RAMON INSUA, JOSE PEPE
GONZALES OTERO, JUAN POMBO are illegal aliens at the time of the within em-
ployment with the Respondent and could not obey the order of the Administra-
tive Law Judge and offer them reinstatement to their former jobs or substan-
tially equivalent positions, and this fact was not before the Judge when he ren-
dered his decision but it is timely for the issue to be presented to this
Court.

In his answer the Respondent brought forth material that had not been before
the Administrative Law Judge that is very material to this proceeding and
should be considered for its application to any order of compliance that
could issue from this proceeding. That material was that Respondent was im-
pressed by the action of District #9, the prior April to the within claim of
unfair labor practice charges, caused a raid by the Immigration and Natural-
ization Service that netted three workers alleged to be illegal aliens. There
are other facets to this case that are not applicable, but the clipping was
added to the Respondent's answer, as was letters from MILTON MUSICUS, Direc-
tor of the Office of Construction acting under the Mayor of the City of New
York dated May 29, 1973. In addition Respondent attached letters from The
Board of Education Division of School Buildings, by its Director of Mainten-
ance and Operations dated July 1975 and one quote should suffice to show
the degree of the growing dilemma of any contractor doing painting work for
the City would and was in at that period "Any non-citizen that is found work-
ing on the job should be reported to this office at once so that arrangements
can be made for the cancellation of the contract". Now all concerned is

aware of the decision without a written opinion by the Supreme Court in January 1977 but based as it probably is upon the written decision of a three Judge Court handed down on 3/24/76 it is pertinent to note that the language of the decision makes a point of stressing the "legally admitted resident alien" with which we are not now dealing in this matter. These facts are brought to the attention of this Court as they have become applicable since the matter was before the Administrative Law Judge and the Respondent is faced with an insoluable decision. The only course opened to him is to relinquish the painting facets of his contracts to union shops.

A R G U M E N T

The Administrative Law Judge finds (A-33) that Pantzos had 'several days work remaining' at the time of his layoff on 2/4/74. The specifications and contract numbered 165-71/72 and 705947 respectively show that on 1/9/74 \$2000.00 had been spent on the gym floor refinishing, with a \$1000.00 of materials and labor and other costs yet remaining. No testimony has been adduced as to what remained by February 4th other than Pantzos statement (A-128) that "on the last day of January when the job ended to fix the gym to call Mr. Prote that had been finished, what to do" and continuing "he told me to paint all the black parts" and again on line 13 of A-128 "I finished the floor, yes" and again on A-137 at line 21 "I finished it on February 2nd" The witness Pantzos said that after he left on February 2nd (A-138) "the first floor was left and the basement and some stairways". The specifications and contract respectively numbered 156 71/72 and 705947 show that the \$8000.00 charge for painting the basement was less than $\frac{1}{2}$ of the entire painting bill and it was completed between 1/9/74 and 3/20/74 with the remaining employees some of whom had signed authorization cards. On A142 and 143 the witness testifies that he was laid off because of the income tax matter and that Mr. Prote did not tell him that if he joined the union he would be fired.

None of the alleged discriminatees charged Prote or anyone connected with him had ever intimated that they would be fired because of the Union Pantzos A143-144, Otero 153-154; Pombo A172-176; Rial 183; Gonzalez 186-187.

Indeed the Union representative FRANK JAUME, testified (A308) that Prote did not say that the men should not join the Union nor did he say that he, (Prote) was getting out of the painting business because he didn't want the union.

On the matter of the illegality of the aliens there is an enormous problem in our country about them and it must be solved by the Congress and the courts and agencies of our government. The President has indicated his strong desire to accomplish a clarification of the problem, the AFL-CIO is properly concerned about the affect of the illegal alien and his taking jobs away from organized workers. Certainly District #9 has shown its concern. It would be helpful if this Honorable Court would address itself to this factor involved herein as the Administrative Law Judge did not have the area before him. The Respondent and others like him are caught in the middle if they wish to remain competitive and State and Local laws even if over-turned do not wash away the problem.

In the instant matter, there was no recrimination, no harassment, no interference, no restraint on the part of the Respondent. The contract and specifications prove what area of the jobs were completed without any per adventure of a doubt, and the Court is asked to scrutinize them carefully.

C O N C L U S I O N

For the foregoing reasons the Respondent asks that the entire matter be remanded for another hearing preferably before the Justice Department and the Labor Department for an intensive investigation before any judgment of the NLRB take place.

FRANK G. CREAMER
SHELDON FEINSTEIN

Attorneys

March 28, 1977

What Kind Of America?

By James Reston

WASHINGTON, Jan. 6—President Ford's ski-slope invitation to Puerto Rico to become the 51st state was the most sudden and surprising notion he has had since he liberated Eastern Europe from the Soviet Union, but it has certain possible advantages.

It could, but probably won't, make this city think again about its immigration policy, which is a mess, about the Caribbean islands in general, which are beautiful jungles of economic and racial tension; and about the awkward and even alarming economic, social and strategic problems of our relations with Mexico and Panama. All this and Cuba, too, is some challenge.

The main fact about the movement of people into the continental United States is that it is out of control. Each year more enter illegally, and remain here than enter legally.

The Immigration and Naturalization Service of the Department of Justice estimates that there are now between six and eight million illegal aliens residing permanently in the United States—roughly as many as the total number of unemployed as of Jan. 1.

These are estimates, but there are some hard facts. In fiscal year 1975, 655,814 illegal aliens—mostly from Mexico—were arrested and deported without formal hearings, and 23,433 were deported after judicial proceedings. But this is a revolving door. The faster they are deported, the faster they return.

Mexico has a population of over 60 million, with an unemployment rate of over 20 percent and no effective unemployment insurance. By its own official estimates, Mexico will have a population of over 100 million at the end of the century, so there is an increasing problem, and there is no wall high enough along a 2,000-mile border to keep them from coming from a poor country to a rich one.

The movement of legal immigrants is a different and more manageable

question. This is determined by the Congress of the United States.

Since 1965, different quotas have been applied to Latin America and Asia, and the figures for fiscal 1975 indicate a dramatic shift from the trend favoring applicants from Western and Eastern Europe. For example, 62,000 legal immigrants from Mexico in fiscal '75—more than the total from Britain (12,000), Germany (5,000), France (2,000), Greece (10,000), Italy (11,000) and Portugal (11,000).

In this same year, of the total number of legal immigrants—386,194—31,000 came from the Philippines, 28,000 from South Korea, 14,000 from India, 9,000 from Taiwan, 12,000 from Hong Kong, and 4,000 each from Japan and Thailand. By comparison: 11,000 from Canada, 25,000 from Cuba, 14,000 from the Dominican Republic, and 10,000 from Jamaica.

President Ford's suggestion of statehood for Puerto Rico did not affect this pattern. As citizens of the United States, Puerto Ricans have the same right of movement into the continental United States as the citizens of any state in the Union. But Mr. Ford ignored the larger questions that must be faced by President-elect Carter:

How to deal with the unemployment problems when there are more illegal aliens in the country than unemployed? How to analyze the effect on this nation of the shifting pattern of immigration from Europe to Latin America and Asia? And maybe more important, what to do about a nation with unacceptably high rates of unemployment that won't do its own work, but imports or tolerates an army of illegal servants to harvest its fruit and vegetables and serve its tables?

This is not merely a problem of hiring a new class of manual laborers, waiters, dishwashers, etc., to do the menial dog work of life in America; even the medical profession is relying on immigrants to serve the hospitals of our great cities, and take jobs in the little communities of the nation that can't find American doctors and interns who will stick to the lonely but valiant service of village life.

Maybe we can't control the flow of illegal immigrants into the United States. In fiscal 1975 alone, over seven million nonimmigrant visitors came to the United States, and in a vast country, it is almost impossible to find many of them who come as visitors but remain and are given jobs by employers who evade the law for convenience, or don't know what the law is.

In short, there are fundamental questions of domestic and foreign policy here which President Ford has touched on, almost frivolously, in the last days of his Administration. They are not primarily questions of the future of Puerto Rico but of the future of the United States and its relations with its neighbors, the source of its immigrants, the integrity of its laws, the future of its economy, and the willingness of its own people to do its own work.

Whether Puerto Rico is a state or a commonwealth, these problems will remain—including the appalling problems of unemployment and exploitation of the Puerto Rican people in the island, and their life of welfare and food stamps here in the continental United States—but President Ford has at least given us a chance to turn to the Caribbean and Central America and it will be interesting to see if Mr. Carter gives the matter the serious attention it has so long deserved.

WASHINGTON

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District Council No. 9 OF NEW YORK CITY INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES

● Tel. (212) 255-2950



142 8500

● 69 WEST 14TH STREET, NEW YORK, N.Y. 10011

● JAMES D. BISHOP, Secretary Treasurer

July 9, 1974

AGREEMENT

PROTE CONTRACTING CORP., hereby recognizes DISTRICT COUNCIL NO. 9, BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO, as the authorized bargaining agent for its painting and paper-hanging employees.

The Union and the employer hereby agree to enter into negotiations for a collective bargaining agreement for a term of three (3) years from August 1st, 1974, and said negotiations shall not continue beyond September 1st, 1974.

These negotiations shall encompass all working conditions, wage rates, fringe benefits and tools of the trade.

DISTRICT COUNCIL NO 9, BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO

By: James D. Bishop S. T. R.

PROTE CONTRACTING CORP.

By: [Signature]